of claim then be allowed to be filed.

MS. SCHULTZ: That's correct, your Honor.

THE COURT: So there has to be a successful motion before the bankruptcy court first.

MS. SCHULTZ: That's correct, your Honor.

THE COURT: OK. What's the likelihood of that to you?

MS. SCHULTZ: I think, frankly, it's highly unlikely because we are two plus years past the applicable bar date. Judge Morris has listened to a number of parties who have asserted that they meet the Pioneer standard. She's put forth some very careful decisions in the St. Vincent's case and in other cases outlining what you must do in order to meet the Pioneer standard. And based on my experience in front of her, as well as my experience in front of other judges in the Southern District, I think it unlikely that this particular case would meet the Pioneer standards.

THE COURT: How about the point that service on a decedent is a nullity?

MS. SCHULTZ: Let me first -- that was the next point I wanted to address. So, first Ms. Menkes referenced us to Erie. Erie is only applicable if the Court is sitting in diversity jurisdiction. The bankruptcy court is not sitting in diversity jurisdiction, so we don't think Erie is applicable.

Second, we have read all the cases that were in her pleadings and after I do this, I'd like walk you through sort

of what is required under the bankruptcy code for notice. I think that will be helpful.

The cases that Ms. Menkes cited as we read them really stand for the proposition that a cause of action survives if plaintiff's or defendant's death under New York State law and that proper substitution should occur prior to any dismissal of an action. They don't really stand for the proposition as we read them that service on a decedent is a nullity.

But I think what would be helpful --

THE COURT: Although it would stand to reason that if you served a dead person --

MS. SCHULTZ: It would stand to reason although you know Ms. Menkes already asserted that the debtor's files contained an address for their next of kin. I'm holding in my hands the admissions form which is one of the documents that was before the bankruptcy court. It has no address for Ms. Garvey.

THE COURT: Let me ask you, does the -- why did the trustee have the decedent on a debtor -- a creditor list?

MS. SCHULTZ: The way the process works, when you gather parties that you are going to serve it was not because the trustee necessarily believed that they were a known creditor -- which is at an important distinction and I'll come to that. When you go back and you generate the list of parties that you are going to serve in bankruptcy parlance, what I tell

my clients when I represent the debtor and I didn't represent the debtor. I represented the committee and now represent the trustee. I wasn't in control of the actual service. I tell them we are going to serve every one and their mother and their brother and the kitchen sink and that's the process that you go through. So you pull your accounts payable. You pull your accounts receivable. You pull them for a set period of time. And you serve everyone that you have in your accounts payable and your accounts receivable.

So I can't as I stand here today -- and it would be impossible I think for me to identify for you -- Mr. Brophy was on this list because of reason "X". But what I can tell you is that just because someone appears on that list does not mean that it's because we believe that that person was owed money. We do it out of an abundance of caution and you serve them on whatever address you have in your records.

THE COURT: Let me ask you, as you stand here, Ms. Schultz, today are you aware of any facts which indicate that your client had any notice of a medical malpractice claim by the decedent?

MS. SCHULTZ: No, your Honor. And you in fact Judge Morris -- and I am sure you've read the transcript -- did a careful review of the documents and she cited a number of cases and we cited a number in our papers, each of which say that just because two years before the Chapter 11 cases initiated

and the bar dates began to be served up, just because we received a request for medical records, does not make that person a known creditor.

Lots of people send requests. Lots of people say that they think this there's been negligence. Lots of people threaten litigation. That does not in and of itself under the applicable case law make a party a known creditor because hundreds of people send those requests. Hundreds of people make threats. Very few actually initiate litigation.

THE COURT: And when you, Ms. Schultz, let me ask it differently. When the process was undertaken here to give notice to potential creditors were individuals who had sent in requests for medical records included as part of the kitchen sink?

MS. SCHULTZ: No, your Honor, they weren't. And the reason that they weren't, those requests -- just to help you understand the process -- they go to a clerk. If a notice of demand or a notice of complaint or a notice of claim had been sent a separate letter that said we're initiating litigation. You send it to an officer. You send it to a director. You send it to the head of the nursing home. You send it to the head of the hospital. That pay have generated putting the insurance company on notice which would have resulted in that person becoming what we would refer to in bankruptcy parlance as a known creditor and they would have been included.

But if we were to try to distill every single person that sends a request for medical records and maintain a list and keep that, that would be impossible. We get probably 50 requests a week because patients have moved, patients are seeing a new doctor. You can imagine a lot of the reasons why there would be a request for a copy of medical records coming from a nursing home.

THE COURT: All right.

MS. SCHULTZ: With respect to the issue of notice because I think this is important -- I am not going to go through all the facts other than to say that we don't agree with everything that she said and I don't think for today's purposes it's dispositive.

The supreme court has provided some very clear guidance with respect to what notice is required in the context of a Chapter 11 case and with respect to -- In Mullen v. Centennial Hanover Bank and Trust Company, which is at 339 U.S. 360, the bankruptcy court held that to satisfy the due process requirements notice must be reasonably calculated under all circumstances to apprize interested parts of the pendency of the action and afford them an opportunity to present their objection.

In the context of a Chapter 11 case, courts in the Second Circuit have held this requires that a creditor receive reasonable notice at the initial filing and of the bar dates.

To achieve this, a debtor must send actual notice of a bar date to a known creditor while constructive notice generally -- publication notice is sufficient with respect to an unknown creditor.

Whether a creditor is known or unknown is guided by several principles. Specifically, your Honor, I've referenced the court to XO Communications. In this case the court said a known creditor is one whose identity is actually known by the debtor and any claimant whose identity is reasonably ascertained. That's at 301 BR 793 Bankruptcy Court Southern District New York 2003.

As noted by the Court in In Re: Crystal Oil which is a Fifth Circuit case, to be a known creditor a debtor must have in its possession at the very least some specific information that reasonably suggests both the claim for which the debtor may being liable and the entity to whom it will be liable.

In contrast, an unknown creditor is one whose claim is merely conceivable conjecture or speculative. In the case at hand the only --

THE COURT: I am sorry, Ms. Schultz. The unknown is conceivable --

MS. SCHULTZ: Conceivable, conjecture or speculative.

THE COURT: All right.

MS. SCHULTZ: So in the case at hand the only indicator as we've discussed today that the debtors had, the

movant was a known creditor at the time that the bar dates were issued were two letters requesting copies of medical files. Those medical files were provided. The movant asserts that because she issued these requests where she advised that she's been retained to investigate claims of nursing home abuse and neglect, that occurred while Ronnie Brophy was a resident that Mr. Brophy was a known creditor. However, as noted by this court in Victory Memorial Hospital which is at 435 BR 1 Bankruptcy Court Eastern District of New York 2010, a mere request for medical files is not sufficient to render a party a known creditor. Records can be requested, as we've discussed, for a variety of reasons.

As noted by Judge Morris and as held in In Re: Trump; Taj Mahal Associates, the creditor who like the movant in our case, sent a letter to the debtors requesting a possible claim, was not known -- regarding a possible claim was not a known creditor, as many people threaten to file suits although only a nominal number actually bring them.

THE COURT: Well, let me ask because I think that somewhere between the two arguments that you folks have made I've lost the heart of the appeal that would be the appeal that Judge Castel would hear. As I understood it, he was going -- the issue was going to be -- and that's set forth I think in Paragraph 11 Page six of the papers was that Garvey was a known creditor.

But I also -- is that right, Ms. Menkes, that's the heart of the appeal?

MS. MENKES: Well, the heart of the appeal is that Garvey was a known creditor and that the decedent was served after he was dead. I have a lot of rebuttal.

THE COURT: I understand and then I'll let you have a moment but I just wanted to make sure that I understood because it also sounds like those arguments are going to be made but they are going to be made out of the context of an appeal of an adverse determination of a notice of an excusable neglect determination.

MS. MENKES: Excusable neglect is going to be argued because even though Judge Morris said in his transcript it was argued in the August motion. And so that was --

THE COURT: Although she says in her transit that she's not deciding it. So whether or not it may have been raised, she did not reach a determination. So you don't have an adverse determination from which you would be appealing.

MS. MENKES: Well, in that case then that's another reason, as you said, I would definitely need a stay. I was under the impression that this was argued but Judge Morris was very offended that I went to state court even though my research showed me that it was a viable option. And I went there believing that there was insurance coverage.

But I just want to say, your Honor, arguing the

appeal, we are starting to argue the merits of the appeal which is not what we should be doing here.

THE COURT: The one thing that we do have to do is understand the likelihood of succes on the merits. And that is in Paragraph 11 it does turn on this known creditor issue.

MS. MENKES: And as well as serving the decedent who was dead because Erie v. Thompkins does -- it states it was a diversity case but it says a federal court sitting in a state must go by that state's law.

THE COURT: Sitting in diversity.

MS. MENKES: The trustee does not offer any alternative service or process statutes. And it is my understanding there are no federal service of process statutes because this is a state law substantive matter. If you serve in a state you'd have to go by that law. And in terms of --

THE COURT: Let me hear the rest of what Ms. Schultz has to say and then we'll come back to you.

MS. MENKES: I apologize.

MS. SCHULTZ: Thank you, your Honor.

As Judge Morris determined -- and I understand we're not here to argue the merits of the appeal -- but Judge Morris made a very carefully reasoned decision. She did not abuse her discretion we do not believe when she determined that based on the laws and the facts as they are before her, were before her, that Ms. Garvey and Mr. Brophy were unknown creditors to this

estate. But in this case, your Honor, the analysis doesn't stop there. While we believe that they were unknown creditors as has been stated and is evidenced by the service that were serviced filed with bankruptcy court, Mr. Brophy was served at the last known address, the address that the debtors had in their books and records.

As the bankruptcy court discussed and is noted in In Re: v. Fashion which is noted at 224 BR 426 Southern District of New York, when evaluating service the noticing party must use reasonable diligent effort which does not mean that the noticing party must conduct practical and extended -- in the names due process. Instead reasonable diligence involves -- focus on the debtors own books and records.

THE COURT: All right. Lets just stop for a moment because Mr. Brophy it sounds like is both a known creditor or something and we're not sure what. But he was somehow on the books, on the trustee's list of known creditors. But he also was an unknown creditor. Do I have that right? Because it sounds like you folks did serve him as a known creditor in the bucketed of known creditors.

MS. SCHULTZ: We served him the bucket of potential creditors, not necessarily known creditors. Just because during the last three years you were on the accounts payable or the accounts receivable doesn't mean on the day that we filed you were, actually, a creditor that you were, actually, owed

MS. SCHULTZ: That's correct, your Honor.
THE COURT: All right. So the notice of claim is a gating factor as to which the issue of constructive versus actual notice is critical.
MS. SCHULTZ: I believe that it is, yes, your Honor.
THE COURT: OK. What other points do you need to make? Let me ask you one more thing. The issue here as to whether or not to issue a stay is not only the factors that go into a stay but the likelihood of success prong also, obviously, incorporates the abuse of discretion whether or not the bankruptcy judge abused her discretion in applying and in making her initial determination as to the likelihood of success. So, whether or not I would come out the same or differently is different from whether or not there's been a showing of an abuse of discretion. Would you agree with that proposition.
MS. SCHULTZ: We would agree with that, your Honor.
THE COURT: All right.
MS. SCHULTZ: The only other point that I would like to make, your Honor, is -- and then I'll cede the podium.
Ms. Menkes has spoken a little bit about the sanctions provisions that were contained in the underlying order that was entered in August. Those were late to the state court proceedings. Your Honor, I am not sure those are really ripe as we sit here today. Just to give you a little bit of history

on how that all unfolded. At the August 15th hearing Judge Morris indicated that she was going to award fees in light of certain actions that had occurred. She asked us to provide a statement as being liquidating trustee with respect to our fees. We've provided those. There was a hearing on September 19th. She asked in response to some filings that had been made for additional information, both from my firm and Ms. Menkes. Those documents, at least from my firm, have been submitted. I'm not sure if Ms. Menkes had an opportunity to submit hers not. And that issue in the actual award of the amount of fees is not going to be heard until November. The actual award of the amount of the fees will not be heard until November. So I'm not sure if that issue is even ripe right now as we sit here today.

MS. MENKES: That issue is not before the Court.

THE COURT: All right. Well, in any event, then you both agree.

MS. SCHULTZ: Yes.

THE COURT: We don't have to deal with that.

MS. SCHULTZ: Great.

THE COURT: Ms. Menkes, I want to just focus on one particular issue. In my view in order for me to issue a temporary stay I have to determine that Chief Bankruptcy Judge morris abused her discretion in making her determination that inter-alia, the state court action should be dismissed because

there's no notice of claim and there was constructive notice provided, etc. And I am finding the argument that Ms. Schultz has put forward persuasive on the point that showing excusable neglect is going to be difficult but even so, based upon the careful and the thorough job that Chief Judge Morris did, how do I say that she abused her discretion here?

MS. MENKES: Well, your Honor, first of all, I don't believe that you have to come to that conclusion.

THE COURT: Not to show a likelihood of it though.

MS. MENKES: The cases that Ms. Shultz cited and that Judge Morris cited in her decision are not on point. A disparate from the issue at hand, none of them deal with decedent whose been dead two years. None of them deal with the New York State law service of process. None of them deal with the fact that the bankruptcy cases hold that an estate is a known creditor.

Ms. Schultz said that the decedent was both known and unknown. There's no case law that says you can be known and unknown. Either you are known or you're unknown. There is no overlying circle that you can be both. The service of process on Brophy was -- if you excuse my language -- in normal parlance is called sewer service. It just is serving everybody and every place but the debtor has certain obligations.

THE COURT: Well, what Ms. Schultz argues is -- this is where I made the point about Mr. Brophy was both a known

creditor but also unknown, that he -- it does appear as if his medical malpractice claim was unknown.

MS. MENKES: We don't know that.

THE COURT: Well, you would be the one who would know it since you were hired a month after he died.

MS. MENKES: They don't know where either why he was on their list.

THE COURT: But that's not enough right now to survive the -- I mean, that seems to fall within the conceivable. So for an unknown claim, the claim can't just be conceivable which it sounds like it was. You have to have, to be a known creditor the debtor has to have some specific information as to whom the debt is a owed and for what.

MS. MENKES: Well, he was on their list of service, so they must have the -- they're not coming forth with the specific information. But and nevertheless, he was served.

THE COURT: I am saying it is conceivable. But how do we get from conceivable to known? Because conceivable --

MS. MENKES: He was known. I actual -- they argued against me. I argued that a known creditor is entitled to actual notice. And in opposition they put forth these affidavits of service which I sought for the first time and in the motion papers in the underlying action. They argued that he was a known creditor and he got actual notice. Then I said he was dead two years. Now we're in a different position

because New York State Law CPLR 1015, specifically, holds that you cannot serve a dead person. And there's case law that supports this. I can cite it from my papers if I can find it.

And Judge Morris would not let me argue those points and she was very -- I think, I understand the corporate structure and bankruptcy law and I think there's more of a emphasis on this point in getting a smooth resolution of this case rather than letting someone come in at this point that's going to throw a wrench in the whole thing. But Judge Morris was very offended that I went to state court even though my research said that was an appropriate forum and even though I had no indication, conclusive indication that there was no insurance in state law mandated that there was.

And it's been my experience that when a debtor is in bankruptcy there's usually a stipulation to proceed with a state action up to the limits of the insurance policy. I am looking for my citations for CPLR 1015. (Multiple cases cited)

THE COURT: Yeah. I actually think though that there are -- this is where I keep coming back to the point of the medical practice claim being an unknown claim. And I understand what your arguing, Ms. Menkes, is that this fellow shows up for some reason on a list that the trustee has. They serve him with sewer service, however characterized, I understand that they were serving a decedent at a decedent's last known address. So one could argue whether that could be

effective unless you've got a Ouija board. But the issue that we have here is whether or not you're ultimately going to be able to show that the constructive notice was, as a matter of law, ineffective --

MS. MENKES: Well, you can't have constructive noticed on a dead person either.

THE COURT: -- in appropriate. Well, the constructive notice was not on him. It's going to be on the executor or representative of the estate.

MS. MENKES: The case law that Ms. Schultz cited a very general. But there is specific case law that I've cited to in my papers, bankruptcy law that holds the estate is a known creditor. Ms. Garvey was the estate. She was the administrator of the estate.

THE COURT: Now, is the estate -- it cannot be the case. I wouldn't think that every patient that was at this nursing home that was associated with St. Vincent's that the estates of those individuals who passed away just before, during and just after, but prior to the finality of the bankruptcy proceeding are known creditors. It's got to be the case that what that must mean is that a known -- that when you have a known claim that the estate steps into the shoes of the known creditor there.

Ms. Schultz, is that --

MS. SCHULTZ: Yes, your Honor, that's correct. If a

bankruptcy estimate when required to go through and look at every party who had died during the approximate period that you had just described, that would be a Herculean effort that in and of itself may exhaust all of the resources of the estate -- no recovery for creditors.

MS. MENKES: There is no case law that says debtor don't have to go through -- the case law that says they don't have to do unreasonable effort to locate creditors. However, all the case law says they have to look at their own books and records. The debtor served themselves at their own facility. Their own books and records would indicate this man had died. Therefore, it wasn't proper service.

But I do want to point out one thing, your Honor. This case In Re: JA Jones Inc. 492 F.3d 242 Fourth Circuit holds that an estate is a known creditor, whereas here, careful examination of the debtors own books and records would have alerted the debtor to the possibility that the claim right reasonably filed against it by the estate.

So, in this case an estate is a known creditor and all the other cases about known and unknown. They're very general premises. You can take a case with general premises and lay down very general law but when you drill down in these cases you see there's different circumstances arise and different situations. There is a very good chance on probability or possibility on appeal that this will be granted. As a matter

of fact --

THE COURT: But let's take an alternative route. The alternative route is that the state court action is dismissed. You go back to which would moot the appeal in front of Judge Castel, I would assume. You go back to bankruptcy court. You file a motion for a late notice of claim on the basis of excusable neglect. Let's assume for the moment it's been denied. Based upon similar reasoning that was used as to the issues here. That then does leave the opportunity for an appeal to the district court on the same bases, largely, as what you are arguing right now. In other words, you'd be arguing known versus unknown and you'd be arguing whether the excusable neglect standard had been met. So, you'd be able to pursue those.

And if you are correct that there is a likelihood that the district court would reverse then you would get a reverse back down to the bankruptcy court. You'd get a notice of claim and then could undertake the proceedings that Ms. Schultz has described. Why isn't that sort of at least an alternative that gives you a second pathway so that you're not DOA if you have to dismiss your state court action.

MS. MENKES: Because I am positive it'll be denied as is Ms. Schultz.

THE COURT: But you can come up -- then can you appeal that decision to the district court.

MS. MENKES: But no underlying action, where will the damages be liquidated?

THE COURT: Because Ms. Schultz has said there is answer entire process -- If I've got it right not, I am relying upon the fact that if there was a duly issued notice of claim for the ad damnum amount which currently is ten million. We've talked about 1.5 but it's currently ten million is the ad damnum amount, that as duly issued notice of claim would then go through a procedure whereby there would be discussions attempting to the resolve it, mediation and then ultimately a process which could itself sever be appealed to the direct court.

MS. SCHULTZ: Yes, that's correct, your Honor.

MS. MENKES: I would just like to say, your Honor, that my client has a Constitutional right to a jury trial, that it's my experience in handling these cases that I've gone through mediation but if there's no jury trial looming in the horizon, there is really no resolution of these issues. And I don't know why the state court action then could not be stayed until this route is exhausted. I have no interest in proceeding with the state court action. I just would like it to be stayed and nothing further done.

THE COURT: I hear you, Ms. Menkes. I think that you -- I am going to rule. And I'm going to deny the application for a stay and require that you comply with Chief

Judge Morris' order.

The reason for that is -- there are a number of reasons. One, there is a -- I do not find that Judge Morris abused her discretion and her underlying finding that there's a likelihood that it will be shown that she abused her discretion. I believe that the irreparable harm here is really on -- there is a harm on both sides in irreparable harm not necessarily on either side.

In terms of the creditor, while the state court action would be gone and the statute of limations would be run and that will occur, there is still an unexhausted route before the bankruptcy court of filing a motion for excusable neglect to get a late filed notice of claim. That, if it's denied, can then be appealed to the district court. The various issues relating to whether or not the excusable neglect should have been found, including whether or not the debtor was a known creditor -- I'm sorry -- of whether Ms. Garvey was a known creditor could be argued and those points could then be raised. And if the district court then found that there was error below then it would send it back to the bankruptcy court. If a notice of claim then issues then there's a procedure that Ms. Shultz has described which would allow for the resolution of the claim ultimately.

In addition, there is real harm to having a lack of finality to this very large estate that has got numerous

claims, some unliquidated, some liquidated where there's a distribution in the offing. And this action which is a major reason to look at it so closely, this action could prevent and be a gate between resolution of this bankruptcy proceeding in a timely way and hold it up.

So it does appear also that on the merits it is more likely than not that this Mr. Brophy was an unknown creditor because while his claim may well have been at best conceivable under the legal standard, it is clear that the debtor did not have specific information as to the claim and to whom the claim was for and for what it is for. If it turned out that he was on the list because St. Vincent's had self-reported medical malpractice, that is something as to which the trustee is unaware and something that I think is relatively farfetched. I have no idea why this individual was on a creditor list. But I do think take the trustee's proposition that everybody and the kitchen sink is served. Therefore, I think it is more likely than not that actual notice would not be required and that constructive notice to the unknown creditor would be sufficient which was made and that therefore that is a likely outcome.

I also think that there is public policy favoring the finality of a bankruptcy proceeding, particularly, when there is an alternative here where the notice of claim procedure, the excusable neglect procedure with an appeal route of the district court can be taken advantage of. And based upon all

of the factors that are before the Court, the case law that's before the Court in terms of how the cases are read, the Court does credit Judge Morris' rationale and does as a result of that deny the motion for the temporary stay.

So I believe that that means that the state court action should be dismissed with prejudice today, October 1st, and that then the appeal before Judge Castel is moot and then you can take whatever further action you believe is appropriate in the bankruptcy court.

MS. MENKES: Your Honor, I can't dismiss it today. I have no time. I can do it tomorrow. I can't do it today.

THE COURT: All right. There will be no stay. So I am Part One judge tomorrow too. So dismiss it tomorrow and that would be in compliance by close of court tomorrow. That will be in compliance with Chief Judge Morris' order. And we may see you again as you go back to the process of the notice of claim process with Chief Judge Morris. And if you then appeal to the district court you'll be assigned to another district court judge.

Is there anything further that we should do?

MS. SCHULTZ: Your Honor, we would request that Ms. Menkes provide us with evidence of such dismissal.

MS. MENKES: I have no problem.

THE COURT: All right. She'll provide you with such evidence.

All right. This matter is terminated and we are adjourned. Thank you.

(Adjourned)